No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLEE'S OPENING BRIEF

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STATEMENT OF FACTS.

Appellant, Jew Ben On, arrived at the Port of San Francisco Ex S. S. Tjikembang on November 26, 1920 (Ex. A, p. 64) and thereupon made application to enter the United States as the minor son of a lawfully domiciled Chinese merchant, to wit, Jew Ngow.

In support of his said application there was filed the affidavit of the alleged father, Jew Gow, alias Jew Lee Kee, bearing the photographs of affiant

and Jew Ben On (Ex. A, p. 3), the affidavit of Emory Chow, bearing affiant's photograph (Ex. A, p. 2) and the affidavit of Jew Ben Heung, bearing affiant's photograph (Ex. A, p. 1).

The application of the said Jew Ben On was denied by a Board of Special Inquiry on the grounds that the mercantile status of the alleged father had not been established to its satisfaction (Ex. A, p. 56). From this decision an appeal was taken to the Secretary of Labor, Washington, D. C., who affirmed the action of said Board and dismissed the appeal (Ex. A, p. 87).

Thereafter, April 1, 1921, a petition for writ of habeas corpus was filed in the United States District Court (T. R. p. 3) and order to show cause issued (T. R. p. 9).

A demurrer was interposed and filed June 25, 1921 (T. R. p. 10) which said demurrer was sustained and petition denied June 27, 1921 (T. R. p. 13).

It is from this order and judgment of the District Court sustaining the demurrer and denying the petition that this appeal is taken.

The memorandum opinion of the Secretary of Labor affirming the action of the Board of Special Inquiry and dismissing the appeal is found at page 87 of the respondent's Ex. A, with marginal notations giving the pages of the exhibits where the testimony referred to therein is found. The fact that Jew

Ben On is a minor and the son of Jew Ngow is conceded.

The Government further concedes that the said Jew Ngow is lawfully resident within the United States, being a Chinese laborer in possession of a certificate of residence issued to him under the name of Du Mon (Ex. D).

It appears from the testimony of Mrs. Agnes H. Merryman (Ex. A, p. 19) and Miss Blanche Baker (Ex. A, p. 16), which testimony is supported by a number of cancelled checks in respondent's Ex. D., that Jew Ngow, under the name of Jew Mung, had been employed as a cook and family servant in the Merryman household for about nine years and was so employed during the entire year prior to the arrival of his son, Jew Ben On, November 26, 1920.

On page 4 of appellant's brief, counsel admits "That Jew Ngow did not devote his entire time to the affairs of the Emory Chow Company for the year prior to the arrival of his son, Jew Ben On."

ARGUMENT

Seven errors were assigned as grounds of appeal to this Court, but counsel for petitioner has evidently abandoned all but one, for he says on page 4 of his brief "There is but one question for this Court to determine and that may be stated as follows: Is a laborer of Chinese descent who resided in the United States in the year 1880 entitled to bring into the United States members of his family."

It is urged by counsel for appellant that Jew Ben On is entitled to admission as the minor son of Jew Ngow by reason of the fact that Jew Ngow, being a lawfully domiciled Chinese laborer, is entitled to bring into the United States his wife and minor children.

It is the Government's contention that appellant, Jew Ben On, is not entitled to admission under the Chinese Exclusion Laws and Treaty because of the fact that his father, Jew Ngow, is a Chinese laborer and, therefore, the minor children partake of the status of the father (at least until they are old enough to acquire an independent status) and are therefore to be classed as laborers in contemplation of law, although they may not be such in fact.

Section 1 of the Act of May 6, 1882, entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese, Approved May 16, 1882," as amended by the Act of July 5, 1884 (22 Stat. L 58, 23 Stat. L 115), provides in part as follows:

> "That from and after the passage of this Act, and until the expiration of 10 years next after the passage of this Act, the coming of Chinese laborers to the United States be, and the same is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any port or place or having so come to remain within the United States."

This Act was kept in force for various periods of ten years each until the Act of April 29, 1902, as

amended and re-enacted by Sec. 5 of the Deficiency Act of April 27, 1904 (32 Stat. L., part 1, 176, 33 Stat. L., 394-428), was passed. This last mentioned Act, entitled "An act to prohibit the coming into and to regulate the residence within the United States, its territories, and all territory under its jurisdiction, and the District of Columbia, of Chinese and persons of Chinese descent," provides in part as follows:

> "Sec. 1. All laws in force on the 29th day of April, 1902, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein, including Sec. 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the Act entitled "An Act to prohibit the coming of Chinese laborers into the United States,' approved Sept. 13, 1888, be, and the same are hereby re-enacted, extended and continued, without modification, limitation or conditions."

Appellant, Jew Ben On, being a laborer in contemplation of law, because of the communicated status of his father, and never having been within the United States, is not entitled to enter as a returning laborer under the provisions of the Act of September 13, 1888, not having the return certificate required by Sec. 7 of said Act. He is not entitled to enter under the provisions of Sec. 1 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, which prohibits the coming of Chinese laborers to the United States, and he cannot enter of his

own right as a person other than a laborer, not having the certificate required by Sec. 6 of said last named Act, showing him to be a teacher, student, merchant or traveler for curiosity or pleasure. It matters not what the financial standing of Jew Ngow may be, or that he himself is entitled to remain, he being a domiciled laborer, with a certificate of residence allowing him to so remain. If he is in fact a laborer, his wife and minor children are not entitled to enter as the wife and minor children of such laborer, nor otherwise than of their own independent status, and then only upon presentation of the certificate required by law.

It was so held in an opinion by Mr. Justice Field in the "Case of the Chinese Wife in re Ah Moy, on Habeas Corpus", decided in the Circuit Court, District of California, September 22, 1884 (21 Fed. 785). In this case the Court says:

> "Too Cheong is a Chinese laborer, and resided in the United States, November 17, 1880, and until September, 1883, when he made a visit to China. While there he married a Chinese woman, who, from her appearance in Court, must be a mere child. He returned in September of the present year, bringing his wife with him. Before his departure he obtained from the collector of the port the necessary certificate to enable him to return to the United States. It, however, gave him no authority to bring another person with him. The fiction of the law as to the unity of the two spouses does not apply under the Restriction Act. As a distinct

person she must be regarded, and, therefore, must furnish the certificate required, either by Section 4 or by Section 6 of the Act of 1884."

In the case of *United States vs. Chu Chee et al*, 93 Fed. 797, decided by this Court March 6, 1899, a case in which two Chinese were admitted to the United States claiming to be students, but who did not have the certificate required by Section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, and who were later arrested and ordered deported after a hearing before a United States Commissioner, this Court, speaking through His Honor, Morrow, Circuit Judge, says:

"But not only do the defendants fail to show that their entry into and residence in the United States was lawful, and under a certificate showing that they belonged to a privileged class, but it appears affirmatively that they were at that time the *minor children of a Chinese laborer*, and that they are still minors. *The status of the defendants, under the laws, was that of the father.* The policy of the Exclusion Acts is to prohibit the entry into the United States of this entire class of Chinese laborers as a class. * * * The defendants belonged to that class upon their arrival in this country, and they so continued up to the time of their arrest; and, not having the certificate as required by Section 6 of the Act of May 5, 1892, as amended by the Act of November 3, 1893, they were not entitled to remain in the United States and should have been deported."

Practically the same question was presented to this Court in the case of *Yee Won vs. White,* 258 Fed. 792, in which this Court affirmed the judgment of the District Court denying the writ prayed for. The case was taken to the United States Supreme Court on writ of Certiorari, where the judgment of this Court was affirmed, 41 S. C. 504, 65 L. Ed. 600 (Adv. opinions). As this opinion is short, it is quoted herein in full:

> "The courts below denied petitioner's application for a writ of habeas corpus to secure release of his wife and minor children, who, having been denied admission upon their arrival at San Francisco from China, were being held for return. 258 Fed. 792. He must be regarde' here as a Chinese person first permitted to enter the United States in 1901 as a resident merchant's minor son, but who subsequently acquired the status of laborer and as such entitled to remain.
>
> In respect of the parties specially concerned the Circuit Court of Appeals said: "The father of Yee Won died in San Francisco in 1908. In the latter part of 1910 Yee Won applied to the Immigration officers at the port of San Francisco for an identification of his status. He was about to depart for China and it was his purpose to secure such an identification as would secure his admission upon his return. He made no claim that he was a merchant. His claim was that he was 'a capitalist and property owner'. He was granted such a certificate and departed for China in January, 1911. He returned on May 29, 1914. He was then 33 years

of age. He claims to have married Chin Shee in China, March 2, 1911, and that a daughter Yee Tuk Oy was born to them November 28, 1912, and a son Yee Yuk Hing was born to them on November 2, 1913. These three are the present applicants to enter the United States. They were all born in China and this is their first application to enter the United States."

The writ was properly denied unless as matter of law such a laborer may properly demand that his wife and minor children be permitted to come into this country and reside with him notwithstanding they were born in China and have never resided elsewhere. In support of such right *United States v. Mrs. Gue Lim*, 176 U. S. 459, is cited, and it is said that the reasoning therein which permitted her to enter because a merchant's wife applies to the family of a Chinese laborer, who lawfully resides here. But that case turned upon the true meaning of Section 6, Act of July 5, 1884 (Ch. 220, 23 Stats. 115), which required every Chinese person other than laborers as condition of admission to present a specified certificate. The conclusion was that the Section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go.

The treaty of 1894, 28 Stats. 1210, provided that "the coming, except under conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited," but this "shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the

United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement." Exclusion of all Chinese laborers, with certain definite, carefully guarded exceptions, was the manifest end in view, and for a long time the same design has characterized legislation by Congress. "In the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." See Act of May 6, 1882, 22 Stats. 58; Act of July 5, 1884, 23 Stats. 115; Act of September 13, 1888, 25 Stats. 476, 477; Act of May 5, 1892, 27 Stats. 25; Act of November 3, 1893, 28 Stats. 7.

The special object of the treaty of 1894 was to secure assent of China to the limitation or suspension by the United States of immigration or residence of Chinese laborers. Prior to that time rather drastic legislation had undertaken to limit such immigration and residence. These statutes were "reenacted, extended, and continued, without modification, limitation, or condition" by Act of April 29, 1902 (Ch. 641, 32 Stats. 176) as amended by Act of April 27, 1904 (Ch. 1630, Sec. 5, 33 Stats. 428) and are now in force notwithstanding the treaty of 1894 expired in 1904. *Hong Wing v. United States,* 142 Fed. 128. This well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty, as members of an exempt class, and later assumed the status of laborers. We think our statutes exclude all

Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children.

The judgment of the court below is

Affirmed.

Mr. Justice Clarke dissents.

The only difference between the case at bar and that of Yee Won supra is that in the latter case Yee Won entered the United States and became a laborer subsequent to the passage of the Act of 1882, while in the case at bar the applicant, ~~or~~ Jew Ngow, first entered in 1880 and obtained a certificate of residence under the Act of 1893.

The fact nevertheless remains that Jew Ngow is a laborer and that his minor son is to be classed as such and that the Supreme Court in the decision just quoted intended in the closing paragraph thereof to make it plain that our statutes exclude all Chinese persons belonging to the class defined as laborers.

We submit that the record in this case does not disclose any unfairness and that the judgment of the Court below should be affirmed.

Respectfully submitted,

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